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Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

FEDERATION OF LORTON COMMUNITIES,

Petitioner,

v.

MARION BARRY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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58 pp

QUESTIONS PRESENTED

1. Whether Congress, in granting the District of Columbia control and management over institutions on Federal land located in the Commonwealth of Virginia, conveyed to the District jurisdiction over the land on which such institutions are situated?
2. If, in granting the District of Columbia control and management over institutions on Federal land located in the Commonwealth of Virginia, Congress did convey jurisdiction over such land to the District, do the statutes granting such jurisdiction violate Article I, section 8, cl. 17 of and the Tenth Amendment to the Constitution of the United States?

LIST OF PARTIES

The parties to this proceeding are the petitioner Federation of Lorton Communities and the respondents District of Columbia Mayor Marion Barry, the Counties of Fairfax and Arlington, Virginia, and the City of Alexandria, Virginia.

The same parties appeared in the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner Federation of Lorton Communities respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on July 20, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is unreported. It is reprinted in the appendix hereto, p. 6a, *infra.*

The memorandum decision of the United States District Court for the Eastern District of Virginia (Bryan, C.D.J.) is unreported. It is reprinted in the appendix hereto, p. 9a, *infra.*

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §1331, the petitioner brought this suit on April 17, 1986, in the United States District Court for the District of Columbia. On October 15, 1986, the district court transferred the action to the Eastern District of Virginia. On January 2, 1987, the Eastern District granted respondents' motions to dismiss. *See* p. 10a, *infra.*

On petitioner's appeal, the Fourth Circuit on July 20, 1987, entered a judgment and an opinion affirming the order of the Eastern District. *See* p. 6a, *infra.* No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant Constitutional and statutory provisions are set forth in the appendix hereto, p. 1a, *infra.*

STATEMENT UNDER RULE 28.4(b)

Since the proceeding draws into question the constitutionality of the Acts of March 3, 1909, 35 Stat. 688, 717; March 16, 1926, 44 Stat. 208, 209, D.C. Code Ann. §3-106; December 20, 1944, 58 Stat. 819, 821, D.C. Code Ann. §1-337(c); and June 27, 1946, 60 Stat. 320, D.C. Code Ann. §24-442, and

neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. §2403(c) may be applicable.

No court of the United States as defined by 28 U.S.C. §451 has, pursuant to 28 U.S.C. §2403(a), certified to the Attorney General the fact that the constitutionality of such Acts of Congress have been drawn in question.

STATEMENT OF THE CASE

Petitioner, the Federation of Lorton Communities, is a non-profit association composed of local community civic associations, other non-profit and non-partisan organizations, and individuals within the area known as Lorton, in the County of Fairfax, Virginia. Also within the Lorton area is a 3,000 acre enclave (the "Lorton Reservation"), owned by the United States. By act of Congress, the District of Columbia was given use and administrative control over this Reservation for the purpose of constructing and operating a workhouse and reformatory. This suit was brought to prevent respondents from using portions of the Reservation for a regional waste landfill and municipal waste incinerator. The jurisdiction of the district court was invoked under 28 U.S.C. §1331 (general federal question jurisdiction).

By the Appropriation Act for the District of Columbia approved May 26, 1908, Congress authorized the President of the United States to appoint three commissioners to investigate conditions in the jail and workhouse of the District of Columbia. Act of May 26, 1908, Pub. L. No. 139, 35 Stat. 274, 303.[1] The

[1] Copies of the non-codified Acts of Congress relevant to this action, together with related legislative histories, were [footnote continued]

report of the commissioners recommended the abandonment of the workhouse and jail then located within the District of Columbia and the purchase of two tracts of land in the State of Maryland or the State of Virginia, one for a site for the erection of a reformatory and the other for a site for the erection of a work house. *See,* S. Doc. No. 724, 61st Cong., 3d Sess. at 2 (1910).

In the District of Columbia appropriation act approved March 3, 1909, Congress authorized and directed the Commissioners of the District of Columbia:[2]

> to purchase two tracts of land, widely separated, of not less than one thousand acres each, either or both of which to be situated in the State of Maryland or in the State of Virginia; one of said tracts shall be used as a site for the construction and erection of a reformatory of sufficient capacity to accommodate at least one thousand inmates, and the other for the construction and erection of a workhouse of sufficient capacity to

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among the materials provided to the Fourth Circuit in the form of a "Statutory and Legislative Appendix." To assist the Court in its review of this Petition, counsel for petitioner requested the clerk of the Fourth Circuit to certify the record below pursuant to Rule 19.1. However, the clerk of the circuit court refused to do so.

[2] A three member Commission appointed by the President of the United States governed the District of Columbia between 1878 and 1967. Act of June 11, 1878, 20 Stat. 102. In 1967, the Commission was replaced by a presidentially-appointed Mayor-Commissioner and an appointed City Council. Reorganization Plan No. 3 of 1967, 3 C.F.R. 1026 (1966-70 Compilation). In 1973, this form of government was replaced with the existing system in which the Mayor and City Council are elected. District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973). Except as otherwise provided in the 1973 Act, the Mayor is granted functions previously vested in the Commissioner. *Id.* at §422.

> accommodate at least five hundred prisoners, and to build necessary temporary structures on each tract . . . .

Act of March 3, 1909, Pub. L. No. 303, 35 Stat. 688, 717.

Shortly after passage of the act of Congress approved March 3, 1909, the District of Columbia publicly advertised for proposals for such sites. After reviewing thirty-two bids received on April 10, 1909, the first site selected was that for a workhouse, located near Occoquan, in Fairfax County, Virginia. The Commissioners next decided to locate the site for the reformatory upon a tract of land known as the "Belvoir" or "White House" tract, located on the Potomac River about seventeen miles from Washington and less than four miles from Mount Vernon. *See* S. Doc. No. 724, at 2.

On June 21 and 24, 1909, the acting president of the Board of Commissioners and the auditor of the District of Columbia asked the Attorney General of the United States whether title to the land authorized by the Act of March 3, 1909 was to be taken in the name of the Commissioners of the District or in the name of the United States. *See* H.R. Doc. No. 84, 61st Cong., 1st Sess. at 1 (1909). On June 30, 1909, Attorney General Wickersham, in a written opinion addressed to the President, advised that:

> In case such purchase should be made by the Commissioners of the District, they would be without exclusive jurisdiction over the land, as the cession of jurisdiction and authority to purchase, granted to the United States by the States of Maryland and Virginia, respectively, do not apply to the Commissioners of the District. (See Code of Maryland, 1904, p.

> 2087, §26; Code of Virginia, 1904, p. 28, §15.) Indeed, it may be seriously questioned whether, without special legislation in the State of Maryland or Virginia, the Commissioners of the District could lawfully hold prisoners on the lands so purchased within either of those States.

H.R. Doc. No. 84, at 2. Accordingly, the Attorney General recommended that "The act of Congress should be amended so as to require title to the property to be taken in the name of the United States." *Id.*

The Commissioners of the District of Columbia thereafter submitted to Congress a draft of a bill to amend the provision in the District of Columbia appropriation act approved March 3, 1909, for the purchase of sites for a workhouse and reformatory for the District. H.R. Doc. No. 84, at 1, 3. That amendment, approved by Congress on August 5, 1909, provided that:

> [T]itles to the tracts of land to be purchased for a workhouse and a reformatory provided for in the Act approved March third, nineteen hundred and nine . . . shall be taken directly to and in the name of the United States; and in case satisfactory price can not be agreed upon for the purchase of either or both of said tracts, or in case the title to either or both of said tracts can not be made satisfactory to the Attorney-General of the United States, then the latter is directed to procure said tract or tracts of land by condemnation, and the expenses of procuring evidence of title, or of condemnation, or of both, shall be paid out of the appropriations made for the purchase of the tracts.

Act of August 5, 1909, Pub. L. No. 6, 36 Stat. 118, 122.

The United States began, on March 19, 1910, to acquire the Occoquan and Belvoir tracts. As required by

Congress, title to each parcel was taken by and in the name of the United States of America and the deeds recorded in the land records of Fairfax County. *See Transfer of Lorton Reformatory to the District of Columbia: Hearings on S. 1243 Before the Subcomm. on National Penitentiaries of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 92-95 (1975) (hereinafter "*Hearings*"); Jt. App. 8, Par. 12; Jt. App. 25, Par. 12.[3]

In 1911, Congress made arrangements for the "removal of jail and workhouse prisoners from the District of Columbia to the site acquired for a workhouse in the State of Virginia." Act of March 2, 1911, Pub. L. No. 441, 36 Stat. 966, 1003. The Act provided that upon the transfer of these jail and workhouse prisoners from the custody and jurdiction of the Attorney General:

> [t]he Commissioners of the District of Columbia are hereby vested with jurisdiction over such male and female prisoners from the time they are so delivered into the custody of the superintendent . . . including the time when such prisoners are in transit between the District of Columbia and the site acquired for such workhouse, and during the period such prisoners are on such site or in the District of Columbia until they are released or discharged under due process of law . . . .

36 Stat. 966, 1003. *See also* D.C. Code Ann. §24-402 (1981).

In 1912, Congress transferred the Belvoir tract to the War Department. Act of August 24, 1912, Pub. L. No. 338, 37 Stat. 569, 590. Congress thereafter authorized the acquisition of additional land to replace the Belvoir

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[3] References to "Jt. App." are to the Joint Appendix filed in the Fourth Circuit.

tract. Act of March 4, 1913, Pub. L. No. 435, 37 Stat. 938, 969. These lands were acquired on April 10, 1913 and February 5, 1919.[4] Title to each of these parcels was taken by and in the name of the United States.[5] *Hearings, supra.*; Jt. App. 9, Pars. 15, 16; Jt. App. 26, Pars. 15, 16.

Under Virginia law prior to 1919, exclusive jurisdiction over property acquired by the United States pursuant to Article I, section 8, clause 17 of the United States Constitution was ceded to the United States. *See* Va. Code §15a (1904), as amended by Act Approved June 14,

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[4]The record reflects some confusion concerning the exact dates on which the United States acquired these and certain other parcels. *Compare, e.g., Hearings, supra. and* Jt. App. 9, Pars. 15, 16, *with* Jt. App. 26, Pars. 15, 16. The dates given are those reported by the District of Columbia to the Senate Judiciary Committee during hearings conducted by the Subcommittee on National Penitentiaries in 1975. *Hearings, id.* The dates given are also those set forth in petitioner's pleadings. For purposes of a motion to dismiss, such pleadings should be regarded as correct. *See Miree v. DeKalb Co., Georgia,* 433 U.S. 25 (1977). The inconsistency in the dates has practical effect only in the case of the 1919 acquisition (acquisition number three). Because of the uncertainty regarding the date this third parcel was acquired, it cannot be determined on the Record whether the purchase was made before or after Virginia changed its cession laws. *See infra,* at 8-9 and 12, n.9.

[5]Pursuant to subsequent appropriations, six additional tracts of land were acquired for the Lorton Reservation between 1928 and 1953, bringing the size of the Reservation to 2,999.86 acres. *See* Act of June 4, 1934, Pub. L. No. 285, 48 Stat. 846, 869; Act of July 1, 1943, Pub. L. No. 107, 57 Stat. 312, 331; Act of July 18, 1950, Pub. L. No. 616, 64 Stat. 347, 358; Act of July 5, 1952, Pub. L. No. 453, 66 Stat. 374, 381. For a summary of all nine land transactions, see *Hearings, Supra.*, at 92-95. Title to each of the nine parcels acquired for the Lorton Reservation was taken and has continued to be held, from the date of acquisition to the present, by and in the name of the United States. *Hearings, supra,*; Jt. App. 12, Par. 31; Jt. App. 28, Par. 31.

1912, 1912 Va. Acts 563; Act Approved Mar. 22, 1916, ch. 471, 1916 Va. Acts 793; Act Approved Mar. 16, 1918, 1918 Va. Acts 568. This arrangement gave way to a reservation of concurrent jurisdiction in 1919.[6] Va. Code §§17 and 19 (1919).[7]

Virginia's cession law of 1919 provided that the state "retains concurrent jurisdiction with the United States over the [places acquired prior to 1919], so far as it lawfully can . . . ." Va. Code §17 (1919). With respect to property acquired after 1919, the statute provided:

> Concurrent jurisdiction with this State in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the United States for all purposes; but the jurisdiction so ceded shall continue no longer than the said United States shall be the owner of such lands, and if the purposes of any grant to the United States shall cease, or the said United States shall for five consecutive years fail to use any such land for the purposes of the grant, the jurisdiction hereby ceded over the same shall cease and determine, and the right and title thereto shall re-invest in this State.

Va. Code §19 (1919).

As part of its 1926 legislation establishing the District of Columbia Department of Corrections, Congress provided:

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[6] In the course of congressional hearings in 1975, the District of Columbia made no claim of jurisdiction over the Reservation and represented, instead, that jurisdiction over the various parcels was held, either exclusively or "joint[ly] [sic]" by the United States and "Fairfax County [sic]." *Hearings, supra,* at 92-95. At no time during these hearings did the District of Columbia claim that *it* had *any* form of jurisdiction over the Reservation.

[7] *Repealed,* 1976 Va. Acts 211.

> [The D.C. Department of Corrections] shall have complete and exclusive control and management of the following *institutions* of the District of Columbia:
> 1) The workhouse at Occoquan in the State of Virginia;
> 2) The reformatory at Lorton in the State of Virginia; . . . .

Act of March 16, 1926, Pub. L. No. 47, 44 Stat. 208, 209. *See also* D.C. Code Ann. §3-106 (1981). (emphasis added).

In 1944, the District Commissioners were authorized by Congress:

> To rent any building or land belonging to the District or under the jurisdiction of the Commissioners, or any available space therein, whenever such building or land, or space therein, is not then required for the purpose for which it was required . . . .

Act of December 20, 1944, Pub. L. No. 506, 58 Stat. 819, 821. *See also* D.C. Code Ann. §1-337(c).

Finally, on June 27, 1946, Congress provided:

> [The] Department of Corrections under the general direction and supervision of the Commissioners of the District of Columbia shall have charge of the management and regulation of the Workhouse at Occoquan in the State of Virginia, [and] the Reformatory at Lorton in the State of Virginia . . . .

Act of June 27, 1946, Pub. L. No. 459, 60 Stat. 320. *See also* D.C. Code Ann. §24-442 (1981).

In 1971, the District of Columbia entered into a regional agreement, denominated a "Memorandum of Understanding," with the County of Fairfax and the Metropolitan Washington Waste Management Agency ("WMA") (as agent for the County of Arlington, the

Alexandria Sanitation Authority, and the City of Alexandria, Virginia), under which 290 acres of the Lorton Reservation were set aside for use by these local governments as a landfill for their municipal wastes. Under the 1971 agreement, the landfill was operated by the District of Columbia. No provision was made for rent.

In 1981, the District of Columbia, the County of Fairfax, and the WMA (as agent for the County of Arlington, and theCity of Alexandria), entered into a Memorandum of Understanding, which superceded all previous memoranda of understanding between those parties, under which responsibility for operating the municipal waste landfill was transferred from the District of Columbia to the County of Fairfax. Fairfax County has operated the landfill since January 1, 1982.

In 1985, the District of Columbia and the County of Fairfax entered into an "Agreement of Lease," under which the District of Columbia purports to lease to Fairfax County 22.9 acres of the Lorton Reservation to enable the County to "design, construct, operate, and maintain" a facility for the incineration of municipal waste. The lease is to run for a term of thirty years, with a nominal rent of $1.00 per month.

The Lorton Federation of Communities commenced this action against Defendant Barry on April 17, 1986, in the United States District Court for the District of Columbia. Defendant thereafter filed a Motion to Dismiss Or, In The Alternative, For Summary Judgment. Prior to considering the merits of the motion, the court transferred the case to the United States District Court for the Eastern District of Virginia (Alexandria Division) on October 15, 1986.

On November 14, 1986, the Federation moved for leave to file an amended complaint. The motion was granted on November 21, 1986, and an Amended Complaint For Declaratory and Injunctive Relief was filed that same day. The Amended Complaint, among other things, added as Defendants the Counties of Fairfax and Arlington and the City of Alexandria, Virginia.[8]

Discovery was initiated on December 8, 1986. On December 9, 1986, Fairfax County filed a Motion to Dismiss Or, In The Alternative, For Summary Judgment with respect to Counts I through IV of the Amended Complaint. The remaining Defendants thereafter filed similar motions. The Federation filed responses to these various motions on December 18 and 29, 1986. Objections to discovery were lodged on December 23, 1986, and no discovery was obtained prior to the dismissal of the action.[9]

Respondents' motions to dismiss, with respect to Counts I and II, were based principally upon *United States v. District of Columbia*, 788 F.2d 139 (4th Cir. 1986) ("Glenn Dale"), p. 15a, *infra*.[10] That case involved

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[8]The Amended Complaint stated five causes of action. Counts I and II challenged the authority of the Mayor to lease the Reservation for the municipal waste incinerator project and to permit use of the Reservation for a regional municipal waste landfill. Count III challenged, in the alternative, the failure of the Mayor to prepare an Environmental Impact Statement prior to entering into the lease for the incinerator site. Count IV challenged the authority of Fairfax County to enter into a "put or pay" contract for the incinerator. Count V sought to declare the operation of the landfill a public nuisance. Only the issues raised in Counts I and II were raised on appeal.

[9]Because the case was dismissed prior to discovery, the Record does not demonstrate upon which parcel(s) the landfill and incinerator are located.

[10]The case involved property located in Glenn Dale, Maryland. Because reference to this case by the name of either party might be confusing, it will be referred to herein as "Glenn Dale."

a dispute between the United States and the District of Columbia over the possession and use of certain property in Prince George's County, Maryland. The property was titled in the name of the United States, but was in the possession of the District for its use as a sanatorium. After the District closed the sanatorium and published notice of its intent to lease the site, the United States brought an ejectment action in the United States District Court for the District of Maryland. The district court granted summary judgment for the District on the ground that it was the beneficiary of a purchase money resulting trust under Maryland law. *United States v. District of Columbia,* 596 F. Supp. 725 (D.Md. 1984). The United States argued on appeal that an adverse interest in land owned by the United States could not arise under state law.[11] Without deciding that question, the Fourth Circuit affirmed the judgment of the district court, holding that the District's action was authorized by D.C. Code §1-337(c), which empowers the Mayor to "rent" any surplus building or land belonging to the District or under the jurisdiction of the Mayor. The circuit court rejected the United States' argument that section 1-337(c) did not apply to property owned by the United States and, without citing any authority or findings, flatly declared that "[t]he District has jurisdiction over the tuberculosis sanatorium."[12]

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[11] *See, e.g., California ex rel. State Lands Comm'n v. United States,* 457 U.S. 273 (1982); *United States v. Utah,* 283 U.S. 64 (1931).

[12] The decision in *Glenn Dale* does not reveal whether the jurisdictional issue was briefed. Given the manner in which the case evolved, the United States may never have had the opportunity to dispute the court's assumption that the District's use and possession of the property was equivalent to jurisdiction. Had that

[footnote continued]

Following oral argument on January 2, 1987, the district court dismissed Counts I through IV of the Amended Complaint with prejudice. Count V was dismissed without prejudice. pp. 9a-14a, *infra.* With respect to the issues raised in Counts I and II, the district court concluded that the District of Columbia had "every bit of the control and jurisdiction," p. 11a, *infra,* as it had in *Glenn Dale,* and held that case to be dispositive.

The Federation timely filed its Notice of Appeal on January 29, 1987.

On appeal, the Federation repeated its arguments that the use of the Lorton Reservation for purposes other than a prison was *ultra vires* because Congress had acquired the property for the specific purpose of providing a site on which the District of Columbia could construct and operate a reformatory and workhouse and had never authorized its use for any other purpose; that *Glenn Dale* was not dispositive because the facts demonstrated conclusively that Congress had never intended to convey and never did convey to the Mayor any jurisdiction over the Reservation; that the authority which Congress did provide was not equivalent to jurisdiction; and that any attempt by Congress to confer such jurisdiction would constitute an extension of the governmental powers of the District of Columbia beyond the geographic limits established by Article I, section 8 of the Constitution

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opportunity been presented, it seems likely the Government would have argued the point. A 1980 Department of Justice memorandum discussing the authority of the District to lease portions of the land beneath the Lorton Reformatory addressed this very issue. It examined numerous provisions of the D.C. Code in which Congress provided the District with authority over land and concluded: "We do not think that 'jurisdiction' and 'control and management' mean the same thing in the code." R. 12, Exhibit J, at 2.

of the United States without the consent of the State within which the property is located, in violation of Article I, section 8, and the Tenth Amendment. The Federation further argued that because Virginia's 1919 cession law provided for a reversion of Federal title and jurisdiction over the property in the event its dedicated use was abandoned, the District's use of land acquired after 1919 for purposes other than a prison would extinguish the Federal jurisdiction which served as the source for the District's authority over the land. Lastly, the Federation argued that in failing to "rent" the land on which the landfill was located, the Mayor had failed to comply with the express terms of Section 1-337(c).

On July 20, 1987, the Fourth Circuit affirmed the judgment of the district court. Its *per curiam* decision rested entirely upon *Glenn Dale,* which it interpreted to hold, as a matter of law, that "possession and use" of federal property by the District was equivalent to "jurisdiction." p. 8a, *infra.*

REASONS FOR GRANTING THE WRIT

In holding that Congress may, by implication, convey to a municipal corporation jurisdiction over federally-owned property without the consent of the State within which that property is located, the Fourth Circuit has needlessly blurred the important and fundamental distinction between governmental and proprietary interests in federal lands. In so doing, it has created a means by which Congress may circumvent the requirements of Article I, section 8, cl. 17 of the Constitution of the United States. It has needlessly called into question the constitutional validity of numerous federal statutes providing for the District of Columbia's use and management of federal

land. Its decision has also introduced ambiguity and uncertainty in the comprehensive body of law enacted by Congress to govern the powers of the District of Columbia over federal land and in the statutes authorizing the use of federal property by states and municipal corporations. Finally, the court has created a body of law in conflict with the decisions of this Court and of other federal courts of appeal with regard to statutory interpretation and the powers of The District of Columbia.

Congress, quite simply, never gave and never intended to give the District of Columbia jurisdiction over the Lorton Reservation.[13] In the Act of March 3, 1909,

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[13]The only express grant of "jurisdiction" with respect to the District's activities at Lorton is contained in the Act of March 2, 1911, Pub. L. No. 441, 36 Stat. 966, 1003, which grants the Commissioners jurisdiction over "male and female prisoners." Given a literal reading, this provision could hardly be said to convey jurisdiction over the land on which the reformatory and workhouse was located.

Indeed, prior to 1985, the District of Columbia did not assert that it had jurisdiction over the land at Lorton. In fact, it represented to Congress that it did not have jurisdiction. In its own summary of land acquisitions, submitted to the Congress, it described each of the nine parcels comprising the Reservation, gave the statutory authority under which each was acquired, and identified the United States and Fairfax County (*i.e.*, Virginia) as the legal entities posessing either concurrent or exclusive jurisdiction over the land. That document does not identify a single parcel as being within the jurisdiction of the District of Columbia. *Hearings* at 92-95. Nor did the District claim such jurisdiction in the accompanying text or testimony. The only right which it asserted was that of equitable use – a notion perfectly compatible with "management and control", but certainly not constituting legal jurisdiction over the land. *Hearings* at 47.

Furthermore, in its 1971 Memorandum of Understanding regarding the municipal waste landfill, the District claimed to have "beneficial use and complete control" over the "Penal Institute." (R. 12, Exhibit B). Not until its Agreement of Lease for the pro-

[footnote continued]

Congress appropriated funds for the purchase of property which it authorized the District of Columbia to "use" for a reformatory and workhouse. Neither that Act nor any of the subsequent statutes authorizing the acquisition of additional property for the workhouse and reformatory complex[14] specifically conveyed jurisdiction. When Congress established the Department of Corrections in 1926, Act of March 16, 1926, Pub. L. No. 47, 44 Stat. 208, 209, D.C. Code Ann. §3-106, it provided that the Department was to have "control and management" over institutions, not jurisdiction over land. Nor did it use the word "jurisdiction" when, just two years after it enacted D.C. Code §1-337(c), it amended the Department's authority to provide that it should have "charge of the management and regulation" of the workhouse and reformatory at Lorton. Act of June 27, 1946, Pub. L. No. 459, 60 Stat. 320, D.C. Code Ann. §24-442.

The consistent use by Congress of terms other than "jurisdiction" to describe the District's authority over the Lorton Reservation was not merely an exercise in semantics. It was founded upon the fundamental requirement that the United States may exercise exclusive jurisdiction over lands acquired pursuant to Article I, section 8, clause 17 of the Constitution of the United States only with the consent of the state within which the land is located and subject to such conditions as the state may

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posed municipal waste incinerator did the District rather conveniently come to discover and claim that the reformatory was under its jurisdiction. (Jt. App. 38)

[14] Act of March 4, 1913, Pub. L. No. 435, 37 Stat. 938, 969; Act of June 4, 1934, Pub. L. No. 285, 48 Stat. 846, 869; Act of July 1, 1943, Pub. L. No. 107, 57 Stat. 312, 331; Act of July 18, 1950, Pub. L. No. 616, 64 Stat. 347, 358; Act of July 5, 1952, Pub. L. No. 453, 66 Stat. 374, 381.

impose. *See Paul v. United States,* 371 U.S. 245 (1963); *James v. Dravo Contracting Co.,* 302 U.S. 134 (1937).

Congress had originally provided for the District of Columbia to own the property. However, when the Attorney General was asked to advise the Commissioners of the District whether title to the land authorized to be acquired by the Act of March 3, 1909 was to be taken in the name of the District of Columbia or of the United States, his opinion was clear:

> In case such purchase should be made by the Commissioners of the District, they would be without exclusive jurisdiction over the land as the cession of jurisdiction and authority to purchase, granted to the United States by the States of Maryland and Virginia, respectively, do not apply to the Commissioners of the District. [citations omitted]

H.R. Doc. No. 84, at 2. Absent jurisdiction, the Attorney General wrote,

> it may be seriously questioned whether, without special legislation in the State of Maryland or Virginia, the Commissioners of the District could lawfully hold prisoners on the lands so purchased within either of those states.

Id.

At the recommendation of the Attorney General, the Commissioners submitted a proposed amendment to the Act of March 3, 1909 providing for title to be taken in the name of the United States, which Congress approved. Act of August 5, 1909, Pub. L. No. 6, 36 Stat. 118, 122.

In the debate on that amendment, the following colloquy took place:

> Mr. Tawney:
>
> [U]nder that authority [the Act of March 3, 1909], the Commissioners of the District have selected two

tracts of land . . .; but when they were making the contract to purchase it was discovered that the District Commissioners had no authority whatever to take title for the District . . . . Under that purchase sovereignty of course would be transferred from the State in which the land is located to the United States, and the Government of the United States would have to exercise sovereignty and jurisdiction hereafter . . . .

Mr. Hull:

Is it [the amendment] not absolutely necessary . . . in order to give the United States jurisdiction over the land after purchase . . .?

Mr. Tawney:

Certainly. That is what I said.

* * *

Mr. Tawney:

According to the statement of the Department of Justice, the State of Maryland and the State of Virginia are authorized by general law to transfer jurisdiction over any land to the Government of the United States that may be necessary for the use of the United States, but to no other person or political organization.

* * *

Mr. Tawney:

[T]he purchase is absolutely made in Virginia, and it is simply being held up until the title can be taken by the Government and not by the District of Columbia, because the Government will not pay if the title is not taken in the Government. It has been so held by the Attorney-General of the United States that jurisdiction would not vest in the United States

if title is taken in the names of the Commissioners of the District.

* * *

Mr. Tawney:

> [T]his law [the Act of March 3, 1909] authorized the Commissioners of the District of Columbia to purchase these tracts of land and to take title to the land in the name of the District of Columbia. Now, under the general laws of the States of Virginia and Maryland, jurisdiction over that land cannot be transferred to the District of Columbia. It can only be transferred to the United States.

44 Cong. Rec. 4525-4526 (July 19, 1909).

These excerpts from the legislative record leave no doubt that Congress believed that the District of Columbia could not exercise the governmental authority necessary to operate the proposed workhouse and reformatory if the property was owned by the District itself. As the owner of property outside the geographic limits of the District and within the boundaries of another state, the Commissiones would have held only a proprietary interest in that property and could exercise no governmental powers. Special state legislation would have been necessary in order to assure that the District "could lawfully hold prisoners" on the land. H.R. Doc. No. 84, at 2.

The United States, on the other hand, holds land acquired pursuant to Article I, section 8, clause 17 of the Constitution in a dual capacity as both proprietor *and* sovereign. *See, e.g., Camfield v. United States,* 167 U.S. 518 (1897). While the cession statutes of Maryland and Virginia precluded Congress from delegating its governmental powers, there was no limitation on the delegation of its *proprietary* powers. The power of Congress over

the management and disposition of Federal property is not subject to the consent of the state within which the property is located. U.S. CONST., Art. IV, §3, cl. 2; *Alabama v. Texas,* 347 U.S. 272 (1954); *Camfield, supra.*

Congress was thus able to accomplish its objective by taking advantage of this distinction between its proprietary and governmental powers. It provided for the acquisition of the property in the name of the United States, thereby securing federal jurisdiction. It next exercised its power as a proprietor to allow the District to use the property for the purpose of constructing and operating the workhouse and reformatory. The District's authority was then made complete by conveying to the Commissioners jurisdiction over the persons of the prisoners,

> from the time they are . . . delivered into the custody of the superintendent . . . including the time when such prisoners are in transit between the District of Columbia and the site acquired for such workhouse, and during the period such prisoners are on such site or in the District of Columbia until they are released or discharged under due process of law . . . .

Act of March 2, 1911, Pub. L. No. 441, 36 Stat. 966, 1003. The District's status as a permittee was ultimately formalized in the 1926 statute granting the D.C. Department of Corrections "complete and exclusive control and management of the . . . institutions" located on the Reservation, Act of March 16, 1926, Pub. L. No. 44 Stat. 208, 209, D.C. Code Ann. §3-106 (1981), and the 1946 statute placing the Department in "charge of the management and regulation" of those institutions. Act of June 27, 1946, Pub. L. No. 459, 60 Stat. 320, D.C. Code Ann. §24-442 (1981). Federal jurisdiction over the land was never conveyed.

Congress was making this same distinction between proprietary and governmental functions in the Act of December 20, 1944, Pub. L. No. 506, 58 Stat. 819, 821, D.C. Code Ann. §1-337(c), when it authorized the Commissioners to rent surplus property "belonging to" the District *or* under their "jurisdiction."

It is evident on its fact that section 1-337(c) was meant to apply if either the District owned or its commissioners had jurisdiction over the property in question. When the United States argued in *Glenn Dale* that section 1-337(c) was not applicable to property owned by the United States, suggesting in effect that ownership was equivalent to jurisdiction, the Fourth Circuit was absolutely correct in rejecting that interpretation of the statute. If ownership and jurisdiction were identical, there would have been no need for Congress to use both terms; and it certainly would not have done so in the disjunctive. Absent any express indication from Congress that property owned by the United States was excluded, the court quite properly concluded that no such exclusion should be implied.

The circuit court began to err, however, when it assumed that all property within the District's possession and control was either owned by the District or under the jurisdiction of the Mayor. The court evidently never grasped the fact that Congress might wish to delegate the responsibilities of management without also delegating jurisdiction. Having rejected any equivalence between ownership and jurisdiction, it went on to equate jurisdiction with proprietary interests other than ownership. Having "refus[ed] to assume that Congress is ignorant of the distinction in meaning between these two phrases [ownership and jurisdiction] and to ascribe to the statute a meaning inconsistent with its plain language," it assumed either that there was no distinction between possession

and jurisdiction or that Congress *was* ignorant of the distinction in meaning between "jurisdiction" and terms such as "use," "management" and "control."

The court was wrong in either case. Congress has routinely and deliberately employed these various terms to draw a distinction between the District's ownership of land, its use of Federal land, its exercise of management functions over the land or institutions built on Federal land, and its exercise of jurisdiction over Federally-owned land. In certain instances involving property within the District of Columbia, Congress has formally transferred title and given the District government "ownership" of the property. *See, e.g.*, D.C. Code Ann. §32-120 (1981) (transfer of land to Columbia Hospital for Women); Act of September 21, 1961, Pub. L. No. 87-262, 75 Stat. 542 (transfer of Freedman's Hospital to Howard University). It has given the District "jurisdiction" over property located in the District of Columbia in D.C. Code §§8-112, 8-116, and 32-801. It has combined possession and jurisdiction by conveying "jurisdiction and control" in D.C. Code §§8-106, 8-111, 8-122, 8-113, 8-126, 8-130, 8-131, 8-132, 8-133, 8-136, and 8-222 (where the two terms obviously bear different meanings *within* the same statute). It has also given the District the authority to manage Federal property without conveying any jurisdiction whatsoever. The District has been given "use" of Federal property in D.C. Code §8-135; "direction and control" in D.C. Code §6-116; "charge and control" in D.C. Code §§8-138 and 8-148; "control and supervision" in D.C. Code §32-802; and "control and management" in D.C. Code §§3-106 and 32-701.

Congress must distinguish between proprietary interests short of ownership and the exercise of jurisdiction

when dealing with property outside the geographic limits of the District of Columbia. The Constitution specifically limits the jurisdiction of the District of Columbia over land to the area, "not exceeding ten Miles square" ceded to the United States for its Seat of Government. U.S. CONST., Art. I, §8, cl. 17. The Lorton Reservation is clearly not within the area ceded to the United States for use as its Seat of Government. Although the United States is empowered to obtain and exercise authority over "all Places purchased by the Consent of the Legislature of the State in which the same shall be" it could not lawfully extend the jurisdiction of the District of Columbia Government to property located in Virginia. That jurisdiction was limited to the ten mile area ceded to the United States. Congress may have unlimited legislative power over the acquired property within its exclusive jurisdiction; but that power cannot be used unilaterally to obtain or convey jurisdiction over land located within the territory of a state without the consent of that state.

Congress clearly did not believe that its delegation to the District of control over the Lorton Reservation was equivalent to a delegation of jurisdiction. The steps taken by Congress to convey such control were motivated entirely by its belief that a delegation of jurisdiction was constitutionally impermissible. The circuit court's conclusion that such control is the legal equivalent of jurisdiction was reached without any indication that it took this legislative history into account or understood that it was creating the very constitutional tension which Congress had sought to avoid.

The statutes involving the Lorton Reservation are not the only instances in which Congress has demonstrated its sensitivity to the constitutional issues which would arise if any attempt were made to provide the District with governmental power beyond its territorial limits. Congress has consistently limited the authority of the District of Columbia to matters *within* the boundaries of the District of Columbia. For example, the District of Columbia Self-Government and Governmental Reorganization Act restricts the legislative power of the District "to all rightful subjects of legislation *within* the District." 87 Stat. 774, sec. 302 (emphasis added). And when Congress made arrangements for the transfer of jurisdiction among Federal and District agencies under limited circumstances, it specifically limited that authority to property located *within* the District. Act of May 20, 1932, Pub. L. No. 143, 47 Stat. 161, D.C. Code Ann. §8-111.

Congress had every reason to assume that the laws defining the powers of the District over Federal land would be read literally. The entity created by Congress to administer the District is a municipal corporation. Act of June 11, 1878, 20 Stat. 102. *See also Metropolitan R. Co. v. District of Columbia,* 132 U.S. 1 (1889); *District of Columbia v. Woodbury,* 136 U.S. 450 (1890). As a municipal corporation, the government of the District bears the same relationship to Congress as does a city to a state. *District of Columbia v. J.R. Thompson Co.,* 346 U.S. 100 (1953); *O'Donoghue v. United States,* 289 U.S. 516 (1933); *Atlantic Cleaners & Dyers v. United States,* 286 U.S. 427 (1932); *Metropolitan R. Co., supra; Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264 (1821); *United States v. MacFarland,* 28 App. D.C. 552 (1906).

Although the government of the District of Columbia is unique, it shares certain characteristics with the municipal corporations formed by the states. Among these is the fact that the District government has *only* the authority which is *expressly* conveyed by the legislature. *Hazard v. Blessing,* 2 F.2d 916 (D.C. Cir. 1924). *See also Rudolph v. Hunt,* 286 F. 1007 (D.C. Cir.), *cert. denied,* 262 U.S. 744 (1923); *Fay v. MacFarland,* 32 App. D.C. 295 (1908). It can exercise no implied power except those which are essential or indispensable to the exercise of its express powers. *See, e.g., Ottawa v. Carey,* 108 U.S. 110 (1883). In determining whether such powers exist, the rule of strict construction applies, *Water, Light & Gas Co. v. Hutchinson,* 207 U.S. 385 (1907), and any doubt is to be resolved *against* the municipality. *Merrill v. Monticello,* 138 U.S. 673 (1891).

There was absolutely no justification, therefore, for the circuit court to assume that the use of the word "jurisdiction" in section 1-337(c) was merely the result of sloppy legislative draftsmanship; that, in using the word "jurisdiction" in §1-337(c), Congress meant something other than the kind of "jurisdiction" which, in 1909, it believed the District could not constitutionally possess over property in Maryland or Virginia. The circuit court made "jurisdiction" the colloquial equivalent of "bailiwick" and robbed the word of its plain legal meaning contrary to the basic principles of statutory construction laid down by this Court. *See, e.g., Bradley v. United States,* 410 U.S. 605 (1973).

By holding jurisdiction to be the functional equivalent of possession, the Fourth Circuit has needlessly called into question the constitutionality of either the various statutes under which the District authorizes control and management responsibilities over the Lorton Reservation

or of Section 1-337(c) itself. For if possession and control *is* the equivalent of jurisdiction, then Congress effectively conveyed jurisdiction without the consent of the state in which the land is located, in violation of Article I, section 8, clause 17 of the Constitution and of the Tenth Amendment.

The court's decision also introduces uncertainty in the comprehensive body of law enacted by Congress to govern the powers of the District of Columbia over Federal land, opening the door for the District to claim jurisdiction over other land which Congress has placed within its control.

Nor is the decision of the court of appeals limited in principle to the District of Columbia. By creating a body of law which, for the first time, holds that jurisdiction is equivalent to possession, it introduces ambiguity in the case of every statute in which Congress has directly or indirectly authorized the use of federal property by a state or municipal corporation, and creates the potential for litigation regarding the jurisdictional status of each and every such property.

If, moreover, the federal government has the constitutional power to grant the District of Columbia jurisdiction over land within the territory of another state, that power is subject to no principled limitation. Congress could, just as easily, give jurisdiction over Lorton or any other piece of federal property to any other state or political subdivision. The constitutional implications of the decision are enormous, touching as it does the most fundamental relationship between the federal government and the states. The decision below is a dangerous precedent, providing a means by which Congress may circumvent the clear requirements of Article I, §8, cl. 17 of the Constitution of the United States and invade the sovereignty of the states.

The issue raised here has arisen twice in the last two years. It is likely to arise again. In a motion requesting the circuit court to publish its opinion below, the District of Columbia wrote:

> The District is an institutional litigant with jurisdiction over several properties in Virginia and Maryland titled in the name of the United States. Its use of that property has been challenged by neighbors in the past and is likely to be challenged in the future. The opinion, therefore, addresses an issue of continuing public interest.

Motion By The District of Columbia for Publication of Opinion, July 23, 1987 at 1.

CONCLUSION

For these various reasons, Petitioner respectfully submits that this petition for a writ of certiorari should be granted. If petitioner is correct in urging that the District has no jurisdiction over the Lorton Reservation within the meaning of D.C. Code Ann. §1-337(c), or, in the alternative, that the statutes granting such jurisdiction are unconstitutional, the matter should be remanded to the United States District Court for the Eastern District of Virginia for appropriate disposition.

Respectfully submitted,

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October 15, 1987

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, clause 17 of the Constitution of the United States provides in pertinent part:

> The Congress shall have Power * * * To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenels, dock-Yards, and other needful Buildings.

Article IV, Section 3, clause 2 of the Constitution of the United States provides in pertinent part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

The Tenth Amendment to the Constitution of the United States provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Act of March 3, 1909, Pub.L.No. 303, 35 Stat. 688, 717, provides in pertinent part:

> The Commissioners of the District of Columbia are hereby authorized and directed to purchase two

> tracts of land, widely separated, of not less than one thousand acres each, either or both of which to be situated in the State of Maryland or in the State of Virginia; one of said tracts shall be used as a site for the construction and erection of a reformatory of sufficient capacity to accommodate at least one thousand inmates, and the other for the construction and erection of a workhouse of sufficient capacity to accommodate at least five hundred prisoners, and to build necessary temporary structures on each tract . . . .

The Act of August 5, 1909, Pub.L.No. 6, 36 Stat. 118, 122, provides in pertinent part:

> [T]itles to the tracts of land to be purchased for a workhouse and a reformatory provided for in the Act approved March third, nineteen hundred and nine . . . shall be taken directly to and in the name of the United States; and in case satisfactory price can not be agreed upon for the purchase of either or both of said tracts, or in case the title to either or both of said tracts can not be made satisfactory to the Attorney-General of the United States, then the latter is directed to procure said tract or tracts of land by condemnation, and the expenses of procuring evidence of title, or of condemnation, or both, shall be paid out of the appropriations made for the purchase of the tracts.

The Act of March 16, 1926, Pub. L. No. 47, 44 Stat. 208, 209, provides in pertinent part:

> [The D.C. Department of Corrections] shall have complete and exclusive control and management of the following institutions of the District of Columbia: (a) The workhouse at Occoquan in the State of Virginia; (b) the reformatory at Lorton in the State of Virginia; . . . .

The Act of December 20, 1944, Pub. L. No. 506, 58 Stat. 819, 821, provides in pertinent part:

[T]he Commissioners of the District of Columbia are authorized and empowered within their discretion

* * *

(c) To rent any building or land belonging to the District of Columbia or under the jurisdiction of the Commissioners, or any available space therein, whenever such building or land, or space therein, is not then required for the purpose for which it was acquired . . . .

The Act of June 27, 1946, Pub. L. No. 459, 60 Stat. 320, provides in pertinent part:

[The] Department of Corrections under the general direction and supervision of the Commissioners of the District of Columbia shall have charge of the management and regulation of the Workhouse at Occoquan in the State of Virginia, [and] the Reformatory at Lorton in the State of Virginia . . . .

Section 15a of the Code of Virginia (1904) provided:

I. The consent of the State of Virginia is hereby given, in accordance with the seventeenth clause, eighth section, of the first article of the constitution of the United States, to the acquisition by the United States, by purchase, condemnation, or otherwise, of any land in the State required for sites for custom houses, courthouses, postoffices, arsenels, or other public buildings whatever, or for any other purposes of the government. 2. That exclusive jurisdiction in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the United States for all purposes except the service upon such sites of all civil and criminal process of the courts of this State; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands. 3. The jurisdiction ceded shall not vest until the United States shall

have acquired the title to said lands by purchase, condemnation, or otherwise; and so long as the said lands shall remain the property of the United States when acquired as aforesaid, and no longer, the same shall be and continue excempt and exonerated from all State, county, and municipal taxation, assessment, or other charges which may be levied or imposed under the authority of this State.

Section 19 of the Code of Virginia (1919) provided:

The consent of this State is hereby given to the acquisition by the United States, or under its authority, by purchase, lease, condemnation, or otherwise, of any land acquired, or to be acquired in this State by the United States, from any individual, body politic or corporate, for sites for customs houses, courthouses, postoffices, arsenels, soldiers' homes, or other public buildings whatever, or for the conservation of the forests or natural resources of the State,or for the improvement of the rivers, harbors, and coast defenses, whether said land be above or below water, and for any other purposes of the government of the United States; and all deeds, conveyances, or title papers for the same shall be recorded in the county or corporation wherein the land or the greater part thereof lies, but no tax whatever shall be required on deeds made to the United States by which they acquire lands for public purposes. Concurrent jurisdiction with this State in and over any land so acquired by the United States, shall be, and the same is hereby, ceded to the United States for all purposes; but the jurisdiction so ceded shall continue no longer then the said United States shall be the owner of such lands, and if the purposes of any grant to the United States shall cease, or the said United States shall for five consecutive years fall to use any such land for the

purposes of the grant, the jurisdiction hereby ceded over the same shall cease and determine, and the right and title thereto shall re-invest in this State. The jurisdiction ceded shall not vest until the United States shall acquire title of record to said land, but when it has acquired such title, the same shall be and continue exempt and exonerated from all State, county and municipal taxation, assessment, or other charges which may be levied or imposed under the authority of this State. Jurisdiction heretofore ceded to the United States over any land within this State by any previous acts of Assembly shall continue according to the terms of the respective cessions.

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 87-1525

Federation of Lorton Communities,
Plaintiff-Appellant,

versus

Marion Barry, as Mayor of the District of Columbia; The Board of Supervisors of Fairfax County; the Board of Supervisors of Arlington County; City of Alexandria,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., Chief District Judge. (CA-86-1298-A).

Argued: May 4, 1987 Decided: July 20, 1987

Before WINTER, and CHAPMAN, Circuit Judges, and WISDOM, Circuit Judge for the Fifth Circuit, sitting by designation.

Philip Louis Chabot, Jr. for Appellant; Lutz Alexander Prager, Assistant Deputy Corporation Counsel; Robert Lyndon Howell, Senior Assistant County Attorney (David T. Stitt, County Attorney; Frederick D. Cooke, Jr., Acting Corporation Counsel; Charles L. Reischel, Deputy Corporation Counsel Appellate Division; Philip G. Sunderland, City Attorney; John W. Henderson, Assistant City Attorney; Charles G. Flinn, County Attorney; Ara L. Tramblian, Assistant County Attorney on brief) for Appellees.

PER CURIAM:

The appellant, plaintiff below, challenges the authority of the District of Columbia to rent out part of the

land, titled in the name of the United States, that is located in Virginia and that the District controls. The District controls the land for use as its Lorton prison facility; it proposes to lease part of this land to the County of Fairfax to supply the site for construction of a municipal waste incinerator, and it proposes to allow the District and several northern Virginia counties to use part of the Lorton Reservation as a regional municipal waste landfill. The District claims authority for this lease under D.C. Code § 1-337(c) (1981), which authorizes the mayor "within his discretion to rent any building or land belonging to the District of Columbia or under the jurisdiction of the Mayor, or any available space therein, whenever such building or land, or space therein, is not then required for the purpose for which it was acquired . . . ." The district court held that the Mayor was empowered with the authority to provide this lease.

In 1946, Congress established a Department of Corrections for the District, which was to have "charge of the management and regulation" of the Lorton prison complex. The Department replaced a Board established in 1926 to exercise "complete and exclusive control and management" of the facilities. In 1974, as part of the Congressional grant to the District of "home rule," Congress granted to the mayor all powers previously exercised by the Board of Commissioners which had formerly governed the District, which powers included supervision over the Department of Corrections.

Thus the question presented in this case is whether the mayor's authority, reposited for administrative purposes in the Department of Corrections, to exercise "complete and exclusive control and management" over the Lorton complex constitutes having "jurisdiction" over the properties, thus permitting the mayor under § 1-337(c) to

lease any available space not required for the fulfillment of the purpose for which it was originally acquired.

This court in *United States v. District of Columbia*, 788 F.2d 239 (4th Cir. 1986) (the "Glenn Dale" case), held that the District's right to possession and use of some Maryland land, which land, like the Lorton property, was titled in the name of the United States, equaled "jurisdiction" under D.C. Code § 1-337.

> Section 1-337(c) had no language stating, or even suggesting, that property owned by the United States is excluded. Had Congress wished to limit the scope of the power to property *owned* by the District, it needed to use only the phrase "belonging to the District of Columbia" and cound have omitted the phrase "under the jurisdiction of the Mayor."

Id. at 241.

In the Glenn Dale case, Congress had authorized the District, "under the direction and control of the Department of Human Services of the District of Columbia and subject to the supervision of the Mayor of the District of Columbia," to construct and operate a facility for use as a children's tuberculosis sanatorium. Thus the language Congress used in authorizing the District in the Glenn Dale case to acquire the land is identical to that used regarding the Lorton property, and that language was found in Glenn Dale to empower the mayor to exercise "jurisdiction" over the property pursuant to § 1-337(c).

The Glenn Dale case is on all fours with that presented, and thus is dispositive. The judgment of the district court is affirmed.

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 86-1298-A

FEDERATION OF LORTON COMMUNITIES,
Plaintiff,

v.

MARION BARRY, et al.,
Defendants.

ORDER

For the reasons stated from the bench, the court concluding that insofar as Counts I and II of the Amended Complaint are concerned, the land in question was acquired for the purpose of being used by the District of Columbia for prison facilities, and the Mayor and District of Columbia have at least as much jurisdiction and control over the area used as a landfill, and to be used for the construction of an incinerator, as did those entities have over the property involved in *United States v. District of Columbia,* 788 F.2d 239 (4th Circuit 1986), and that the land to be used for the construction of an incinerator is thus within the meaning of D.C. Code § 1-337(c) (1981); that insofar as Count III is concerned the proposed project is not a major federal action since it requires no approval of a federal agency or official, nor is it to be constructed from federal funds, and thus no environmental impact statement is required, 42 U.S.C. § 4332(c); that insofar as Count IV is concerned the underlying purpose of any financial commitment of Fairfax County, Virginia, is to benefit the general public and thus there is no violation of Article X, Section 10, of the Virginia Constitu-

tion, *Troy v. Walker,* 218 Va. 739, 241 S.E.2d 420, 425 (1978); *Harrison v. Day,* 200 Va. 764, 107 S.E.2d 594, 620 (1959); *Almond v. Day,* 197 Va. 782, 91 S.E.2d 660, 667 (1956); and insofar as Count V is concerned, the conclusory assertions, without more, that the conduct of the defendants violates the Water Pollution Control Act, the Clean Air Act, the federal common law of pollution, constitutes a common law nuisance and deprives plaintiff's members of rights protected by the Fourteenth Amendment of the Constitution, do not state claims upon which relief can be granted, it is hereby ORDERED that:

1. Counts I, II, III and IV of the Amended Complaint are dismissed with prejudice.

2. Count V of the Amended Complaint is dismissed without prejudice.

3. This action is dismissed.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
January 2nd, 1987

APPENDIX D

[Excerpts from Transcript of Proceedings]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 86-1298-A

FEDERATION OF LORTON COMMUNITIES,
Plaintiff,

vs.

MARION BARRY, et al,
Defendants.

Friday, January 2, 1987
Alexandria, Virginia

Transcript of motion proceedings in the above-captioned matter.

BEFORE:
The Honorable ALBERT V. BRYAN, JR., Judge
United States District Court

* * *

[36] THE COURT: I think the motions to dismiss and for summary judgment should be granted.

Insofar as Count I and II are concerned, that is, [37] the assertion that the arrangement for the leases beyond the authority of the District of Columbia, not within the District of Columbia's jurisdiction and that the Mayor's act in implementing such agreement would be ultra vires; all of these properties were acquired, albeit in the name of the United States, that is the total 1,900 acres, for reformatory purposes.

The District of Columbia here, it seems to me, has every bit of the control and jurisdiction that it had in the

Glendale case. And by the Glendale case I am talking about the United States against the District of Columbia in 788 F.2d 239.

Given than [sic], you are right square within D.C. Code Section 1-337(c), which is of course a congressional enactment, giving the Mayor the authority to lease land which is not then required for the purpose for which it was acquired. That in my opinion is dispositive of this case. This is land which was acquired for one purpose and has historically and actually been under the control and jurisdiction of the District of Columbia every bit as much as the Glendale was, Glendale Sanatorium was and that is no longer required for the purpose for which it was acquired and therefore the Mayor has the authority to lease it. And that is what he has done. I think that is dispositive of Counts I and II.

Insofar as Count III is concerned, that is the NEPA [38] count, the NEPA statute of course requires an environmental impact statement for a major Federal action that significantly affects the environment. I don't think this is a Federal action. A non-Federal project, which this is, it's not funded by the Federal Government, and its operation will not be controlled by the Federal Government; but a non-Federal project can be considered a Federal action if it cannot begin or continue without prior approval of the Federal agency.

In this case, the action is not funded by the United States; approval of no official of the United States is required. The Federal Government will not control it in any way. The only Federal interest in it is that the Federal Government owns the underlying fee simple title to the land on which the project will be erected, and operating. That is not sufficient to in my opinion make this one a project that cannot begin or continue without prior approval of a Federal agency. There is no authority to

exercise discretion over the outcome of the project; and it is not otherwise a Federal action. So that in my opinion disposes of Count III.

Insofar as Count IV is concerned, that is the attack on the action because it allegedly violates Article 10, Section 10, or Section 10 of the Virginia Constitution, I really think this is no more than a contractual minimum payment requirement which is not much different than any [39] other contract; but clearly the underlying purpose of the financial commitment which the County has undertaken is to benefit the public purpose. It might incidentally benefit a private contractor, but the purpose of insuring that a private contractor will at least make some profit is a necessary element to insure that there will be bidders on the project; and that in my mind is, absent corruption, which no one suggests is even alleged here, is clearly to benefit the public purpose.

I think that's all that is required to get it out from under the credit clause. I rely for that on the Troy against Walker case (phonetic), Harrison against Day, Harmon against Day (phonetic), and while the Supreme Court of Virginia has not perhaps been entirely consistent in all of its cases in that area, they clearly it seems to me have set forth that if the underlying purpose of the financial commitment is to benefit the public purpose, then it's no longer proscribed by the credit clause.

Insofar as Count V is concerned, in my opinion, the allegations are just too conclusory. A mere allegation that this violates our constitutional rights, this violates the Clear Water Act and the Water Pollution Control Act and this constitutes a nuisance, is not in my opinion a sufficient allegation to state a claim upon which relief can be granted.

The motions to dismiss or for – I do not, I might [40] say sustain dismissal of Count V on any statute of limita-

tions or laches or immunity basis. I don't think that these municipalities are immune from injunctive relief nor do I think that the statute of limitations on this record can be said to have run on a not just a continuation of what was originally put there in recent operation of it.

I don't think that these plaintiffs are barred by either laches or the statute of limitations. I do think the claim is barred because it's too vague and conclusory to state a claim upon which relief can be granted.

On that basis, I will dismiss Count V. I will prepare the order.

* * *

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-2329

The United States of America,

Appellant,

versus

The District of Columbia; and The Department of General Services, District of Columbia,

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Herbert F. Murray, District Judge. (C/A 84-696).

Argued: January 7, 1986 Decided: April 14, 1986

Before WINTER, Chief Judge, and SPROUSE and CHAPMAN, Circuit Judges.

Kathleen P. Dewey, Department of Justice (F. Henry Habicht II, Assistant Attorney General; J. Frederick Motz, United States Attorney; David C. Shilton and Pamela S. West, Department of Justice; Catherine C. Blake, United States Attorney on brief) for appellant; Lutz Alexander Prager, Assistant Corporation Counsel (John H. Suda, Acting Corporation Counsel; Charles L. Reischel, Deputy Corporation Counsel, Appellate Division; Roberta Gross, Assistant Corporation Counsel on brief) for Appellees.

CHAPMAN, Circuit Judge:

This case involves a dispute between the United States and the District of Columbia ("the District") over the possession and use of certain property located in Prince George's County, Maryland. The property is titled in the name of the United States but currently possessed by the

District. The United States sued for ejectment. Applying Maryland law, the district court found that the District had an equitable interest in the property and so granted summary judgment for the District. The United States appeals, arguing that federal law should control the resolution of the case. Finding other grounds for upholding the district court's judgment, we affirm.

I

In 1929, Congress authorized the District of Columbia Commissioners to acquire a site and to construct a children's tuberculosis sanatorium. Act of Mar. 1, 1929, ch. 422, 45 Stat. 1425. The next year, Congress amended the Act and added the following provision:

> That if the land proposed to be acquired as a site for the said sanatorium is without the District of Columbia the title to said property shall be taken directly to and in the name of the United States . . . .

Act of Apr. 18, 1930, ch. 186, 71 Stat. 218. Later that year, two parcels of land in Prince George's County, Maryland, were purchased. Together, they are known as the Glenn Dale property. Both deeds transferred title to the United States in fee simple absolute. Neither deed mentioned the District of Columbia, either as a party or as a holder of any interest in the property.

The District constructed the facility for the sanatorium and commenced operations. In the late 1960's, because of medical advances in the treatment and care of tuberculosis, the Glenn Dale facility began to be used less for the treatment of tuberculosis and more for the treatment of other chronic diseases. By 1972, the last tubercular child was treated at Glenn Dale. The facility was used as a general hospital until 1981, when continued operations were found to be economically unfeasible and the facility was closed.

Thereafter, both parties claimed the right to control the Glenn Dale property. The General Services Administration (GSA) claimed that the District had a right to use the property only so long as it was used for a hospital and that GSA could dispose of the property under the Federal Property and Administrative Services Act of 1949, ch. 288, 63 Stat. 377 (FPASA), since hospital operations had ceased. The District published notice of intent to lease the site in November 1982, but attempts to lease the property were suspended pending discussions between the parties. When discussions failed and the District again published notice of intent to lease, the United States brought this action on behalf of GSA in the United States District Court for the District of Maryland. The United States sought to eject the District and enjoin its attempts to lease the property.

On the parties' cross motions for summary judgment, the district court granted judgment for the District; its opinion is reported as *United States v. District of Columbia*, 596 F. Supp. 725 (D. Md. 1984). The court held that the District was not a federal agency under the FPASA so that the FPASA would not apply. Applying the Maryland law of purchase money resulting trusts, the court found that the District held the equitable interest in the property and was entitled to possess and use the property until Congress legislates to the contrary.

II

On appeal, the United States argues that federal law controls the resolution of this dispute and thus the district court erred in applying Maryland law and determining equitable title to the property. We find that the Acts of Congress are sufficiently clear that we need not resort to Maryland law to determine that the District has the right to possess and use the Glenn Dale property.

The United States claims the right to have the District ejected from the property. The United States holds fee simple absolute title to the Glenn Dale property pursuant to the 1930 Act. The United States asserts that it is entitled to possession: allegedly, the District had the right to use the property only so long as it was used for a hospital, and the District forfeited that right by discontinuing hospital operations in 1981. We find no basis for such a condition. Nothing in the 1929 or 1930 Acts indicates any such condition or potential forfeiture, and we refuse to create limitations that Congress did not see fit to impose.

On the contrary, Congress specifically authorized the District of Columbia Commissioners to acquire the site and to construct a facility for use as a children's tuberculosis sanatorium. Congress subsequently provided for the District to control the facility:

> The following hospital and sanatoria, on or after July 1, 1937, shall be under the direction and control of the Department of Human Services of the District of Columbia and subject to the supervision of the Mayor of the District of Columbia: Tuberculosis Sanatoria . . . .

D.C. Code §6-116 [sic] (1981) (originally enacted as Act of June 29, 1937, ch. 403, §1, 50 Stat. 371, 376). The District has continuously exercised control over the property from the time of its acquisition to the present. Finally, Congress has provided:

> The Mayor of the District of Columbia is authorized and empowered within his discretion *to rent any building or land* belonging to the District of Columbia or *under the jurisdiction of the Mayor,* or any available space therein, whenever such building or

> land, or space therein, is not then required for the purpose for which it was acquired . . . .

D.C. Code §1-337(c) (1981) (emphasis added) (originally enacted as Act of Dec. 20, 1944, ch. 611, §1(c), 58 Stat. 819, 821).

The United States correctly observes that this statute applies to property under the control of the District, but it argues that it does not apply to property controlled by the District but owned by the United States. This argument is refuted by the clear language of the statute itself. Section 1-337(c) has no language stating, or even suggesting, that property owned by the United States is excluded. Had Congress wished to limit the scope of the power to property *owned* by the District, it needed to use only the phrase "belonging to the District of Columbia" and could have omitted the phrase "under the jurisdiction of the Mayor." We refuse to assume that Congress is ignorant of the distinction in meaning between these two phrases and to ascribe to the statute a meaning inconsistent with its plain language.

Section 1-337(c) is directly applicable here. The District has jurisdiction over the tuberculosis sanatorium. It ceased operating a hospital at the facility when it was found that it was not economically feasible to make the renovations necessary to continue operations. Thus, Glenn Dale was no longer required as a medical facility, the purpose for which it was acquired. Thereafter, when the District sought to lease the property rather than let it sit idle and deteriorate, it was doing no more than what was already authorized by Congress.

In conclusion, looking at these statutes as a whole, we find that Congress intended for the District to possess and use the property until it legislated to the contrary.

Further, § 1-337(c) governs the present dispute and authorizes the District's attempts to lease the property. For these reasons, the judgment of the district court is

AFFIRMED.

No. 87-611

Supreme Court, U.S.
FILED
OCT 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

FEDERATION OF LORTON COMMUNITIES,

Petitioner,

v.

MARION BARRY, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT BOARD OF SUPERVISORS OF FAIRFAX COUNTY VIRGINIA

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

Whether the authority of the Mayor of the District of Columbia to exercise "complete and exclusive control and management" over the Lorton Reservation constitutes "jurisdiction" within the meaning of D.C. Code Ann. § 1-337(c).

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Letter dated July 25, 1985, from F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division, United States Department of Justice, to James B. McDaniel, Deputy Corporation Counsel, District of Columbia

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No. 87-611

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

FEDERATION OF LORTON COMMUNITIES,

Petitioner,

v.

MARION BARRY, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA

Respondent Board of Supervisors of Fairfax County, Virginia, by counsel,

respectfully asks this Court to deny the petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia is unreported and is attached as Appendix A.

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported and is attached as Appendix B.

JURISDICTION

Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1) (1987).

STATUTES INVOLVED

This case involves D.C. Code Ann. § 1-337(c) (1981), which is attached as Appendix C.

Other statutes are set forth in the appendix to the petition for writ of certiorari, and are not duplicated herein.

Respondent Board of Supervisors of Fairfax County, Virginia, asserts that no constitutional provisions are involved.1/

1/ The Petitioner suggests that certification under 28 U.S.C. § 2403(a) may be appropriate. (Petition at 2-3) Respondent disagrees. Section 2403(a) is not applicable for three reasons. First, no statute has been declared unconstitutional by the lower courts.

Second, the statute in question, D.C. Code Ann. § 1-337(c), applies only to the District of Columbia and concerns a matter of mere local interest. Keyes v. Madsen, 179 F.2d 40 (D.C. Cir. 1949), cert. denied, 339 U.S. 928 (1950). The Court of Appeals did not publish its decision, signifying that the case does not involve an issue of continuing public interest. United States Court of Appeals for the (footnote cont'd.)

STATEMENT OF THE CASE

Course of Proceedings

Petitioner Federation of Lorton Communities (hereinafter "Federation") filed this action in the United States District Court for the District of Columbia on April 17, 1986, seeking declaratory and injunctive relief against

---

1/ (cont'd)
Fourth Circuit, I.O.P. 36.3 (court's opinion will be published if it involves a legal issue of continuing public interest.)

Finally, interpretation of D.C. Code Ann. § 1-337(c) was the identical issue before the court in United States v. District of Columbia, 788 F.2d 239 (4th Cir. 1986) (the "Glenn Dale case"), in which the United States was a party. The United States did not petition this Court for a writ of certiorari when the Fourth Circuit held that the District of Columbia has "jurisdiction," as that term is used in § 1-337(c), to lease property located in Glenn Dale, Maryland, that is titled in the name of the United States but under the control and management of the District of Columbia. Therefore, it is unnecessary to certify this case to the Attorney General.

Marion Barry, as Mayor of the District of Columbia, in a challenge to his authority to permit the use of the Lorton Reservation as a landfill and to lease a portion of the Lorton Reservation to Fairfax County for construction of an energy/resource recovery facility (hereinafter "E/RR facility").

In October 1986 the case was transferred to the Eastern District of Virginia, and the Board of Supervisors of Fairfax County, the County Board of Arlington County and the City of Alexandria were joined as additional defendants.

The Lorton Reservation is titled in the name of the United States but has been used and controlled by the District of Columbia since its acquisition. A portion of the Lorton Reservation has been used as

an interjurisdictional landfill since 1971. Another portion has been leased by the District of Columbia to Fairfax County as the site for construction of an E/RR facility. The E/RR facility will burn municipal wastes and generate steam that can be used directly or converted into electrical energy.

The trial court dismissed all claims concerning the District's right to use the property as a site for a landfill and an E/RR facility. The trial court found that the land was under the Mayor's "jurisdiction" within the meaning of D.C. Code Ann. § 1-337(c) (1981), relying on the decision in United States v. District of Columbia, 788 F.2d 239 (4th Cir. 1986) (the "Glenn Dale case").

The United States Court of Appeals for the Fourth Circuit affirmed the trial court's decision, holding that the case is "on all fours" with the Glenn Dale case. (App. B-4.) In the Glenn Dale case the court held that land located in Maryland that was titled in the name of the United States was within the "jurisdiction" of the mayor for purposes of D.C. Code Ann. § 1-337(c).

The Federation now seeks writ of certiorari to the Fourth Circuit.

Statement of Facts

The Lorton Reservation was purchased in a series of transactions between 1910 and 1953. The land, which is titled in the name of the United States, has been and is used by the District of Columbia.

The original use of the property was as a workhouse and reformatory, a use which continues through the present date. In addition, the I-95 Resource Recovery, Land Reclamation and Recreation Complex (hereinafter "I-95 Complex") was established on the Lorton Reservation by interjurisdictional agreement in 1971 to serve the solid waste disposal needs of Fairfax County, Arlington County, the City of Alexandria and the District of Columbia.

Since 1971 the landfill has been operated in accordance with interjurisdictional agreements. In addition, a portion of the I-95 Complex has been designated as the site for an E/RR facility. On March 10, 1986, Fairfax County and the District of Columbia entered into an Agreement of Lease

(hereinafter "Lease") for a 22.9-acre site for the E/RR facility. The Lease provides that Fairfax County is responsible for the design, construction, operation and maintenance of the E/RR facility, and further, that the District of Columbia shall be able to contribute solid waste to the facility. The draft lease was forwarded to an attorney for the Land and Natural Resources Division of the United States Department of Justice who reviewed it and informed the Office of the Corporation Counsel for the District of Columbia by letter dated July 25, 1985, that the United States had no objection to the proposed lease with Fairfax County. A copy of the July 25, 1985, letter is attached as Appendix D.

SUMMARY OF ARGUMENT

The only question presented in the Federation's petition is whether the Court of Appeals correctly interpreted the word "jurisdiction" as used in D.C. Code Ann. § 1-337(c).

This case does not merit this Court's review because it presents only a question of interpretation of one subsection of the District of Columbia Code. Furthermore, the titleholder of the property, the United States, has indicated that it acquiesces in the right of the District of Columbia to lease the Lorton property to Fairfax County. The United States has specifically stated that it does not object to the lease that the Federation is challenging. (App. D.)

The Federation attempts to implicate Article I, § 8, clause 17 of the Constitution. However, the Court of Appeals has construed the statute so that it does not violate the Constitution, and the Federation concedes that the United States may constitutionally permit the District of Columbia to lease the property to Fairfax County.

ARGUMENT

THE AUTHORITY OF THE MAYOR OF THE DISTRICT OF COLUMBIA TO EXERCISE "COMPLETE AND EXCLUSIVE CONTROL AND MANAGEMENT" OVER THE LORTON RESERVATION CONSTITUTES "JURISDICTION" WITHIN THE MEANING OF D.C. CODE ANN. § 1-337(c).

A. Introduction.

The question presented in this case, correctly stated by the Court of Appeals, is simply whether Congress' intention that

the District of Columbia exercise "complete and exclusive control and management" over the Lorton Reservation constitutes "jurisdiction" within the meaning of D.C. Code Ann. § 1-337(c). (App. B-3.) That statute, enacted by Congress, authorizes the Mayor of the District of Columbia to lease property belonging to the District or under his "jurisdiction" if it is not then needed for the purpose for which it was acquired.

The United States has delegated to the District of Columbia control and management over the Lorton property. D.C. Code Ann. § 3-106 (1981). The Court of Appeals held that control and management constituted "jurisdiction" for purposes of D.C. Code Ann. § 1-337(c). Therefore, the District of Columbia has the authority to lease the Lorton property.

B. <u>There Are No Special or Important Reasons for Granting Review on Writ of Certiorari</u>.

Review on writ of certiorari is a matter of judicial discretion, and will be granted "only when there are special and important reasons" to do so. Sup. Ct. R. 17. In an attempt to elevate this case from a question of interpretation of one subsection of the District of Columbia Code to a question of constitutional magnitude, the Federation claims that the decision below sanctions a violation of Article I, § 8, clause 17 of the Constitution of the United States.

The Federation argues that "jurisdiction" as used in D.C. Code Ann. § 1-337(c) must refer to the power granted to the United States in Article I, § 8,

clause 17. Respondents contend that "jurisdiction" as used in D.C. Code Ann. § 1-337(c) means control and management. The Court of Appeals ruled for the Respondents in accordance with its decision one year earlier in United States v. District of Columbia, 788 F.2d 239 (4th Cir. 1986).[2/]

2/ The essential facts and the holding of that case were identical to those of the case at bar. That case involved property in Glenn Dale, Maryland, that is titled in the name of the United States but has been used and controlled by the District of Columbia since its acquisition. When the property was no longer needed for its original purpose as a tuberculosis sanatorium, the District sought to lease it pursuant to D.C. Code Ann. § 1-337(c). The United States sued for ejectment. The United States Court of Appeals for the Fourth Circuit held that the District of Columbia has "jurisdiction" as that term is used in § 1-337(c), and was therefore authorized to lease it.

Only if the Court had accepted the Federation's position and ruled that the word "jurisdiction" as used in § 1-337(c) refers to Article I, § 8, clause 17 power could any constitutional issue exist.

The Federation's constitutional claim is a ruse, included in an attempt to exaggerate the importance of this case and disguise the fact that the only issue in this case is the interpretation of a subsection of the District of Columbia Code. This Court does not generally review lower court decisions which are limited solely to interpretation of the District of Columbia Code. Del Vecchio v. Bowers, 296 U.S. 280, 285 (1935).

An additional reason to deny certiorari in this case is that the titleholder of the property, the United

States, has accepted the Fourth Circuit's interpretation that D.C. Code Ann. § 1-337(c) empowers the Mayor to lease out federal property within the District's management and control. As a party to the Glenn Dale case, the United States could have petitioned this Court for writ of certiorari. It did not.

Furthermore, the Glenn Dale opinion specifically stated that the District only had "jurisdiction" as used in D.C. Code Ann. § 1-337(c) until Congress legislated to the contrary. United States v. District of Columbia, 788 F.2d 239, 242 (4th Cir. 1986). Eighteen months have passed since the Glenn Dale decision, and the United States has not enacted any legislation that would change the result

of that case and restrict the authority of the District of Columbia over federal property it manages.

The United States always has had full legislative power to protect its interests in its property. It can revoke or restrict the authority of the District of Columbia over the Lorton property or any other federal land at any time. In fact, the lease at issue in this case explicitly recognizes that it can be terminated "by an Act of Congress at any time." (Agreement of Lease, ¶ 18.)

Finally, the United States has stated specifically that it does not object to the lease at issue in this case. The United States was consulted prior to the execution of the lease. The United States Department of Justice informed the District

of Columbia Corporation Counsel that it had no objection to the proposed lease with Fairfax County. (App. D.)

C. The Decision of the Court of Appeals was Correct on the Merits.

Words in a statute may have more than one meaning. Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 433 (1932). If a statute can be interpreted to have different meanings, one constitutional and one unconstitutional, courts are required to choose the constitutional interpretation. Califano v. Yamasaki, 442 U.S. 682, 693 (1979).

The Federation's only argument is that the Court of Appeals misinterpreted the word "jurisdiction." It asserts that the word can only mean legislative

authority. As the Federation recognizes, the United States holds property both as proprietor and sovereign. (Petition at 20.) The Federation argues that Article I, § 8, clause 17 of the United States Constitution prohibits the United States from delegating its legislative authority--sovereignty--to the District of Columbia. However, the Federation acknowledges that the Court of Appeals interpreted the word "jurisdiction" in D.C. Code Ann. § 1-337(c) to refer to proprietary interests, not to sovereignty. (Petition at 22.) Thus the Court of Appeals has construed the statute so that it does not violate the Constitution.

The Federation concedes that the United States' exercise of its proprietary powers is not subject to the consent of

the state in which the property is located. (Petition at 20-21.) The Federation concedes that the United States may delegate to the District of Columbia proprietary authority over federal property (Petition at 20-21), and that the United States may permit the District of Columbia to rent out surplus property belonging to the United States. (Petition at 22.) That is exactly what D.C. Code Ann. § 1-337(c) allows. Thus, there is no constitutional issue.

The Federation's actual argument is that Congress did not intend to allow the District of Columbia the power to lease the Lorton property. However, the Court of Appeals' interpretation of the word "jurisdiction" fulfills the intent of

Congress in enacting D.C. Code Ann. § 1-337(c): to allow the District to use property in its possession and control for municipal purposes rather than have it sit idle. That interpretation is correct.

CONCLUSION

The decision of the Court of Appeals for the Fourth Circuit is correct, and there are no special or important reasons for this court to review that decision. Therefore, Respondent Board of Supervisors of Fairfax County, Virginia, respectfully asks that the petition for writ of certiorari be denied.

Respectfully submitted,

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Fairfax, Virginia 22030
(703) 691-2421

OCTOBER 27, 1987

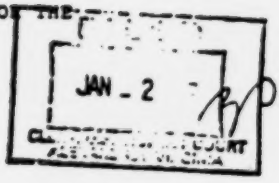
PROOF OF SERVICE

I hereby certify that three copies of the foregoing were mailed, postage prepaid, to Philip L. Chabot, Jr. Suite 800, 1990 M Street, N.W., Washington, D.C. 20036, counsel for Petitioner, and to Lutz Alexander Prager, Assistant Deputy Corporation Counsel, 1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004, John W. Henderson, Assistant City Attorney, 301 King Street, Alexandria, Virginia 22314, and Ara L. Tramblian, Assistant County Attorney, 1400 North Courthouse Road, Arlington, Virginia 22201, this 27th day of October, 1987.

Robert Lyndon Howell
Robert Lyndon Howell

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION



FEDERATION OF LORTON COMMUNITIES,

Plaintiff,

V.

MARION BARRY, et al.,

Defendants.

CIVIL ACTION NO. 86-1298-A

ORDER

For the reasons stated from the bench, the court concluding that insofar as Counts I and II of the Amended Complaint are concerned, the land in question was acquired for the purpose of being used by the District of Columbia for prison facilities, and the Mayor and District of Columbia have at least as much jurisdicition and control over the area used as a landfill, and to be used for the construction of an incinerator, as did those entities have over the property involved in United States v. District of Columbia, 788 F.2d 239 (4th Circuit 1986), and that the land to be used for the construction of an incinerator is thus within the meaning of D. C. Code § 1-337(c) (1981); that insofar as Count III is concerned the proposed project is not a major federal action since it requires no approval of a federal agency or official, nor is it to be constructed from federal funds, and thus no environmental impact statement is required,

42 U.S.C. § 4332(c); that insofar as Count IV is concerned the underlying purpose of any financial commitment of Fairfax County, Virginia, is to benefit the general public and thus there is no violation of Article X, Section 10, of the Virginia Constitution, Troy v. Walker, 218 Va. 739, 241 S.E.2d 420, 425 (1978); Harrison v. Day, 200 Va. 764, 107 S.E.2d 594, 620 (1959); Almond v. Day, 197 Va. 782, 91 S.E.2d 660, 667 (1956); and insofar as Count V is concerned, the conclusory assertions, without more, that the conduct of the defendants violates the Water Pollution Control Act, the Clean Air Act, the federal common law of pollution, constitutes a common law nuisance and deprives plaintiff's members of rights protected by the Fourteenth Amendment of the Constitution, do not state claims upon which relief can be granted, it is hereby ORDERED that:

1. Counts I, II, III and IV of the Amended Complaint are dismissed with prejudice.

2. Count V of the Amended Complaint is dismissed without prejudice.

3. This action is dismissed.

/s/ T.R.B.

United States District Judge

Alexandria, Virginia
January 2nd, 1987

APPENDIX B

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-1525

Federation of Lorton Communities,

Plaintiff - Appellant,

versus

Marion Barry, as Mayor of the District of Columbia; The Board of Supervisors of Fairfax County; the Board of Supervisors of Arlington County; City of Alexandria,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., Chief District Judge. (CA-86-1298-A).

Argued: May 6, 1987 - Decided: July 20, 1987

Before WINTER, and CHAPMAN, Circuit Judges, and WISDOM, Circuit Judge for the Fifth Circuit, sitting by designation.

Philip Louis Chabot, Jr. for Appellant; Lutz Alexander Prager, Assistant Deputy Corporation Counsel; Robert Lyndon Hovell, Senior Assistant County Attorney (David T. Stitt, County Attorney; Frederick D. Cooke, Jr., Acting Corporation Counsel; Charles L. Reischel, Deputy Corporation Counsel Appellate Division; Philip G. Sunderland, City Attorney; John W. Henderson, Assistant City Attorney; Charles G. Flinn, County Attorney; Ara L. Tramblian, Assistant County Attorney on brief) for Appellees.

PER CURIAM:

The appellant, plaintiff below, challenges the authority of the District of Columbia to rent out part of the land, titled in the name of the United States, that is located in Virginia and that the District controls. The District controls the land for use as its Lorton prison facility; it proposes to lease part of this land to the County of Fairfax to supply the site for construction of a municipal waste incinerator, and it proposes to allow the District and several northern Virginia counties to use part of the Lorton Reservation as a regional municipal waste landfill. The District claims authority for this lease under D.C. Code § 1-337(c) (1981), which authorizes the mayor "within his discretion to rent any building or land belonging to the District of Columbia or under the jurisdiction of the Mayor, or any available space therein, whenever such building or land, or space therein, is not then required for the purpose for which it was acquired . . . ." The district court held that the Mayor was empowered with the authority to provide this lease.

In 1946, Congress established a Department of Corrections for the District, which was to have "charge of the management and regulation" of the Lorton prison complex. The Department replaced a Board established in 1926 to exercise "complete and exclusive control and management" of the facilities. In 1974, as part of the Congressional grant to the District of "home rule," Congress granted to the mayor all powers previously exercised by the Board of Commissioners which had

formerly governed the District, which powers included supervision over the Department of Corrections.

Thus the question presented in this case is whether the mayor's authority, reposited for administrative purposes in the Department of Corrections, to exercise "complete and exclusive control and management" over the Lorton complex constitutes having "jurisdiction" over the properties, thus permitting the mayor under § 1-337(c) to lease any available space not required for the fulfillment of the purpose for which it was originally acquired.

This court in United States v. District of Columbia, 788 F.2d 239 (4th Cir. 1986) (the "Glenn Dale" case), held that the District's right to possession and use of some Maryland land, which land, like the Lorton property, was titled in the name of the United States, equaled "jurisdiction" under D.C. Code § 1-337.

> Section 1-337(c) has no language stating, or even suggesting, that property owned by the United States is excluded. Had Congress wished to limit the scope of the power to property owned by the District, it needed to use only the phrase "belonging to the District of Columbia" and could have omitted the phrase "under the jurisdiction of the Mayor."

Id. at 241.

In the Glenn Dale case, Congress had authorized the District, "under the direction and control of the Department of Human Services of the District of Columbia and subject to the supervision of the Mayor of the District of Columbia," to construct and operate a facility for use as a children's

tuberculosis sanatorium. Thus the language Congress used in authorizing the District in the Glen Dale case to acquire the land is identical to that used regarding the Lorton property, and that language was found in Glenn Dale to empower the mayor to exercise "jurisdiction" over the property pursuant to § 1-337(c).

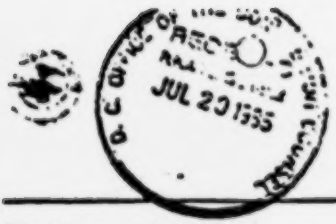
The Glenn Dale case is on all fours with that presented, and thus is dispositive. The judgment of the district court is affirmed.

AFFIRMED.

APPENDIX C

(c) *Leasing powers.* — The Mayor of the District of Columbia is authorized and empowered within his discretion to rent any building or land belonging to the District of Columbia or under the jurisdiction of the Mayor, or any available space therein, whenever such building or land, or space therein, is not then required for the purpose for which it was acquired, and to rent any used personal property belonging to the District of Columbia which is not then needed for the purpose for which it was acquired: Provided, that nothing contained in this subsection shall have the effect of changing in any manner Public Law No. 732, 74th Congress, entitled "An Act to authorize the operation of stands in federal buildings by blind persons, to enlarge the economic opportunities of the blind, and for other purposes", approved June 20, 1936 (20 U.S.C. §§ 107 — 107f).

APPENDIX D



U.S. Department of Justice
Land and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

July 25, 1985

Mr. James B. McDaniel
Deputy Corporation Counsel
District of Columbia
Public Works Division
Room 300, Presidential Building
415 12th Street, N. W.
Washington, D. C. 20004

Dear Mr. McDaniel:

Thank you for your letter of July 8, 1985, informing me of the District of Columbia's plans to enter into a lease agreement with Fairfax County, Virginia, as to a portion of the Lorton Reformatory Tract, which is titled in the name of the United States, and for the opportunity to determine any implications the lease may have for the United States. The lease will allow Fairfax County to build and operate an energy/resource recovery facility on the subject property.

The question of the authority of the District of Columbia to lease portions of the Lorton Reformatory Tract was addressed by this Department in September 1980 in connection with a then-proposed lease. The Department, through its Office of Legal Counsel, issued the opinion that the Mayor has the authority to lease any land purchased under the statutes authorizing purchase of the Lorton site which is still part of the Lorton Reformatory site. This Department, therefore, interposes no objection to the proposed lease with Fairfax County.

With respect to the appropriateness of the particular terms of the proposed lease, this Department defers to the judgment of your office.

I appreciate your coordinating with the Department of Justice in this matter.

Sincerely,

F. Henry Habicht II
Assistant Attorney General
Land and Natural Resources Division

Supreme Court, U.S.
FILED
NOV 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-611

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

FEDERATION OF LORTON COMMUNITIES,

Petitioner,

v.

MARION BARRY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

PHILIP L. CHABOT, JR.
Suite 800
1990 M Street, N.W.
Washington, D.C. 20036
(202) 737-5046
Counsel of Record

November 9, 1987

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

FEDERATION OF LORTON COMMUNITIES,

Petitioner,

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PETITIONER'S REPLY MEMORANDUM

At the very outset of its argument opposing the issuance of a writ of certiorari, the County of Fairfax describes the issue,

> "correctly stated by the court of appeals as simply whether Congress' intention that the District of Columbia exercise 'complete and exclusive control and management' over the Lorton Reservation constitutes 'jurisdiction' within the meaning of D.C. Code Ann. § 1-337(c)."

Brief in Opp. at 11-12. In fact, Congress *never* gave the District complete and exclusive control and management *over the Lorton Reservation.* Congress gave the District such control only over the *institutions* located *on* the Reservation. *See* Act of March 16, 1926, Pub. L. No. 47, 44 Stat. 208, 209, D.C. Code Ann. 3-106; Act of June 27, 1946, Pub. L. No. 459, 60 Stat. 320, D.C. Code Ann. §24-442.

The failure of the respondents and of the court of appeals to recognize the significance of this distinction is symptomatic of the result-driven approach which each has taken toward section 1-337(c). All have discounted or overlooked the fact that Congress limited the District's authority under section 1-337(c) to land located within the District. All have assumed that Congress intended the District to have authority to rent all the surplus land which it either owned or controlled, wherever located, and concluded, in order to achieve that result, that when Congress used the word "jurisdiction" in D.C. Code Ann. §1-337(c), it acted with the understanding that the term was equivalent to proprietary interests such as "use," "possession," and "control."

The difficulty with this argument is obvious. The statute expressly *says* "jurisdiction," and neither the court of appeals nor respondents have *ever* produced a single shred of legislative history to demonstrate that Congress meant anything other than what it said.[1]

Respondents having argued, and the court below having ruled, that the District's "complete and exclusive control and management over the Lorton Reservation constitutes

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[1] When Congress wishes to equate jurisdiction with control, it specifically says so. *See, e.g.* 48 U.S.C. §§747, 749. *Compare, e.g.*, 43 U.S.C. §931a.

jurisdiction", they must now accept the logical consequence of their position. If these terms *are* equivalent, then Congress conveyed jurisdiction when it granted the District such "complete and exclusive control and management."

Fairfax County argues that the constitutional implications of such an act need not be addressed because the court of appeals "has construed the statute [§ 1-337(c)] so that *it* does not violate the constitution." Brief in Opp. at 19 (emphasis added). In this, they miss the point somewhat because the issue is not so much whether section 1-337(c) is constitutional as whether the statutes conveying the proprietary interests which the court found equivalent to jurisdiction are constitutional. They do appear to recognize that if "jurisdiction" in section 1-337(c) actually means "jurisdiction" as the term is typically construed a constitutional issue *would* arise. They argue, however, that the Fourth Circuit cleverly avoided that constitutional question by defining "jurisdiction" to mean "use," "possession," and "control," but *not* "jurisdiction."

Completely overlooked in this rush to debase the English language is the fact that there was an easier way for the court to fulfill its obligation to interpret the statute in such a way as to avoid a constitutional issue. All that was required was for the courts below to take note of the fact that the District of Columbia did not have jurisdiction over the Reservation and could not, therefore, avail itself of the authority to use the land for a purpose other than that for which its use was dedicated by Congress. This approach would have been consistent with the facts and with the whole body of law by which Congress has delimited the conveyance of proprietary interests in federal lands. This alternative completely

escapes the attention of the Respondents, not because it fails to avoid a constitutional issue, but because it ultimately achieves an unacceptable *result.*

Respondent attempts to minimize the significance of the decisions here and in *Glenn Dale* by arguing that they apply to only one little subsection of the District of Columbia Code – that when Congress used the word "jurisdiction" in section 1-337(c), it meant the term to have a unique meaning applicable exclusively to that section and that section alone. The difficulty with this position is that the court's decision holding that "the District's right to possession and use" of the Lorton Reservation "equaled jurisdiction" under that statute does not provide any basis for limiting its decision to that statute. The court did not rest its decision on any language in the statute or in the legislative history to support its conclusion. It simply ruled that the words were equivalent. If "possession" and "use" are equivalent to the word "jurisdiction" in that statute, the court's holding provides no principled reason for precluding such an interpretation of these same words in other statutes. In short, the decision of the court of appeals is limited neither by geography nor the bindings of the District of Columbia Code. If Congress has the power to convey to the District of Columbia jurisdiction over land located in Virginia without the consent of Virginia, it has the power to convey to *any* entity jurisdiction over federal land located in *any* state.

Fairfax County's *post hoc* defense of the Fourth Circuit's decision is without any support in legislative history. It is completely inconsistent with what legislative history is available. And it is, moreover, flatly inconsistent with the decision itself. The Court did not attempt to argue that "jurisdiction" did not mean "jurisdiction."

The court's conclusion in *Glenn Dale*, that "[t]he District has jurisdiction," Petition, App. at 19a, was premised on the presumed equivalence between jurisdiction, use, possession, and control.

It is perfectly clear, furthermore, that the District of Columbia is using the decision of the Fourth Circuit in *Glenn Dale* and *Federation of Lorton Communities* to claim jurisdiction over these properties, not merely some form of proprietary interest. In its Motion for Publication of Opinion, the District of Columbia stated that "[t]he District is an institutional litigant with jurisdiction over several properties in Virginia and Maryland titled in the name of the United States." Motion by the District of Columbia for Publication of Opinion, July 23, 1987 at 1. If the District has jurisdiction over these properties, it was obtained without the consent of the states within which the land is located, in direct violation of Article I, sec. 8, cl. 17 of the Constitution of the United States.

It is completely misleading to say that the United States has "accepted" *Glenn Dale* because no petition for certiorari was filed. As noted in this Petition (p. 13), the only issue which the Fourth Circuit was called upon to resolve in that case was whether section 1-337(c) applied to property owned by the United States. The government's argument that it did not was clearly incorrect. Having utterly failed in *Glenn Dale* to raise the issues presented in this petition, the United States could not have raised such issues in a certiorari position.

Nor has the United States approved the use of the Lorton Reservation for purposes other than a prison. The letter from Mr. Habicht (Brief in Opp., App. D) does not purport to approve the use of the Lorton Reservation as

a landfill on behalf of the United States. The letter states only that the Department of Justice has no objection to such use. The fact that the Department of Justice has no objection to the incinerator conveys a certain patina of legitimacy. But the proffered letter is nothing more than a legal opinion. It has as much value as a legal opinion from the District of Columbia's own corporation counsel or any other attorney. It cannot fulfill the role cast for it by the Respondent because it lacks a necessary antecedent. There is absolutely no evidence in the Record to demonstrate or even suggest that the Department of Justice has the authority to approve the use of the Lorton Reservation for purposes other than those designated by Congress.

The Constitution places the power over federal lands in the hands of Congress. U.S. CONST., Art. I, sec. 8, cl. 17, Art. IV, sec. 3, cl. 2. *See also Alabama v. Texas,* 347 U.S. 272 (1972); *Camfield v. United States,* 167 U.S. 518 (1897). Congress may delegate that authority.[2] *See, e.g. United States v. Cassingnol,* 420 F.2d 868 (4th Cir. 1970), *cert. denied,* 397 U.S. 1044 (1970). But there is absolutely no evidence here that Congress has delegated its authority over the Lorton Reservation to the Department of Justice – or any other federal agency, for that matter. Absent such a delegation of authority, the Department of Justice has no authority whatsoever to allow or consent, on behalf of the United States, to such additional uses. The power of Congress to make rules and regulations concerning the use of land belonging to the United States is without limitation and preempts that of the Executive unless Congress specifically authorizes

[2] Recognition of this fact is no concession. The delegation of authority at issue here is precluded because it is predicated on a separate delegation of jurisdiction which is impermissible absent the consent of the state within which the land is located.

the Executive to exercise such powers. *See, e.g., United States v. Matherson,* 367 F. Supp. 779 (E.D.N.Y. 1973), *aff'd,* 493 F.2d 1399 (2d Cir. 1974). *See also Van Brocklin v. Tennessee,* 117 U.S. 151 (1886); *Butte City Water Co. v. Baker,* 196 U.S. 119 (1905); *United States v. City and County of San Francisco,* 310 U.S. 16 (1940); *United States v. California,* 332 U.S. 19 (1947).

Thus, absent any delegation to the Executive of its authority over federal lands, such authority rests exclusively with Congress. If there is to be any approval of the use of the Lorton Reservation for purposes other than those set forth in the Act of March 3, 1909, it must come from Congress itself.

Finally, the fact that Congress has taken no action to prevent the use of the Lorton Reservation as a landfill or incinerator is of no consequence. There is no authority absent an express grant, *Hazard v. Blessing,* 2 F.2d 916 (D.C. Cir. 1924); and there is no ratification by acquiescence – particularly where, as here, there is no indication Congress was aware of the action in which it is said to have acquiesced. *EEOC v. CBS, Inc.,* 743 F.2d 966, *motion denied* 748 F.2d 124 (2d Cir. 1984).

Respectfully submitted,

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November 9, 1987